

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

ANDREW GORDON, TAVIS MCNEIL,)
DONALD WRIGHTON, NICHOLAS COLE,)
JACOB GRISSON, AND DAWN DEWEY,)
on behalf of themselves and others similarly)
situated,)

Plaintiffs,

vs.

TBC RETAIL GROUP, INC., *d/b/a*)
TIRE KINGDOM,)

Defendant.

No. 2:14-cv-3365-DCN

ORDER

This matter is before the court on defendant TBC Retail Group, Inc.’s, d/b/a Tire Kingdom (“TBC”), motion for summary judgment and decertification, ECF No. 152, and Andrew Gordon, Tavis McNeil, Donald Wrighton, Nicholas Cole (“Cole”), Jacob Grisson, Dawn Dewey’s (collectively “plaintiffs”) motion for summary judgment, ECF No. 153. For the reasons set forth below, the court grants in part and denies in part TBC’s motion for summary judgment, grants in part and denies in part plaintiffs’ motion for summary judgment, and takes under advisement on TBC’s motion for decertification until additional briefs are filed.

I. BACKGROUND

Plaintiffs were employed by TBC as mechanics in TBC’s South Carolina stores. Compl. ¶ 1. Plaintiffs and other mechanics employed by TBC during the relevant time period were responsible for inspecting, diagnosing, repairing, and servicing automobiles. *Id.* ¶¶ 13–14. All mechanics employed by TBC during the relevant time period were, and

1 continue to be, paid pursuant to the same compensation plan. Id. ¶ 16; Answer ¶¶ 15, 16,
2 19, 22, 23, and 31. Under this plan, a mechanic’s total compensation is composed of two
3 basic components. First, each mechanic is paid an amount determined by multiplying the
4 particular mechanic’s “flat rate”—an hourly pay rate assigned to each mechanic based on
5 that mechanic’s particular skill, experience, and certifications—by the mechanic’s
6 “turned hours”—a pre-established amount of time designated by TBC for each
7 mechanical task—for all tasks completed by the mechanic during the relevant pay period.
8 Answer ¶ 16; ECF No. 6 at 4. Thus, this “turned hours” component of a mechanic’s
9 compensation (“Turned Hours Pay”) does not account for the actual time spent working
10 on a particular task or during the pay period overall. Id. at 2. Instead, Turned Hours Pay
11 is based exclusively on the number of tasks completed and the pre-assigned “turned
12 hours” for such tasks. Id. at 5–6. The same measure of “turned hours” used to form a
13 mechanic’s Turned Hours Pay for a particular task is used as the basis for the labor costs
14 charged to the customer for that task, though the rates paid by the customers are, of
15 course, greater than mechanics’ “flat rates.” Id. at 5.

16 When the amount of a mechanic’s Turned Hours Pay earned over a given pay
17 period is less than one and one-half times the statutory minimum wage multiplied by the
18 mechanic’s actual hours worked during the same period, TBC pays a supplemental
19 amount, referred to as “differential pay.” Answer ¶ 19; ECF No. 6 at 6. This
20 “differential pay” is set at whatever amount is needed to render the mechanic’s total
21 compensation—i.e. Turned Hours Pay plus “differential pay”—equal to \$11.02 per hour
22 for all actual hours worked during the period. Answer ¶ 19; ECF No. 6 at 6. As a result,
23 if a mechanic’s “turned hours” fall below a certain percentage of their actual hours, TBC

1 compensates the mechanic as if they earned a straightforward wage of \$11.02 per hour.
2 This “differential pay” is designed to ensure that mechanics always earn at least one and
3 one-half time the statutory minimum wage for all actual hours worked. Answer ¶ 19;
4 ECF No. 6 at 6.

5 On August 20, 2014, plaintiffs filed their complaint against TBC for violations of
6 the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq. Specifically, plaintiffs
7 accused TBC of violations of the overtime requirements as stated in 29 U.S.C. § 207(a).
8 On September 30, 2015, the court granted plaintiffs’ motion for conditional class
9 certification pursuant to the collective action provisions of 29 U.S.C. §216(b). ECF No.
10 40. On August 11, 2016, the court entered an order on several motions: denying TBC’s
11 motion to compel Cole to arbitrate, denying in part and granting in part the TBC’s motion
12 to compel arbitration for all other opt-in plaintiffs who signed the arbitration agreement,
13 granting in part and denying in part TBC’s motion for summary judgment, and granting
14 in part and denying in part plaintiffs’ motion for joinder (“multi-motion order”). ECF
15 No. 112. In denying part of TBC’s motion for summary judgment, the court stated that at
16 that time it was “not in any position to grant defendant’s motion for summary judgment
17 on the issue of willfulness” because “a significant amount of discovery remains.” Id. at
18 39–40. On September 13, 2017, the court stayed the case, pending the outcome of Epic
19 Systems v. Lewis, Docket No. 16-285, which was about to be heard before the United
20 States Supreme Court. ECF No. 118. On July 18, 2018, the court issued an order
21 denying the plaintiffs’ motion to reconsider the multi-motion order and lifting the stay.
22 ECF No. 133.

1 On November 5, 2019, TBC’s Senior Vice President and Chief Human Resource
2 Officer Terri Hoskins (“Hoskins”) was deposed as TBC’s Rule 30(b)(6) designee. ECF
3 116-1 (“Hoskins 2019 Depo”). On January 17, 2020, Hoskins was again deposed. ECF
4 No. 152-11 (together with Hoskins 2019 Depo, “Hoskins Depos”). On February 7, 2020,
5 TBC filed a motion for summary judgment and decertification. ECF No. 152. On the
6 same day, plaintiffs also filed a motion for summary judgment. ECF No. 153. Each of
7 the parties’ motion for summary judgment asked the court to rule in their favor regarding
8 whether the TBC method of compensation is a bona fide commission plan under the
9 FSLA—and if so, whether it is exempted from overtime by 29 U.S.C. § 207(i) (“Section
10 7(i)”). ECF No. 152-1 at 27; ECF No. 153 at 2. In furtherance of their argument that
11 TBC does not have a bona fide commission plan, plaintiffs asserted TBC never
12 established a proper representative period as required by the regulations governing
13 Section 7(i). ECF No. 153 at 2 (quoting 29 C.F.R. § 779.417(d)). In TBC’s response to
14 plaintiff’s motion for summary judgment, filed on February 28, 2020, TBC stated that it
15 “uses a designated one-year representative period for reviewing mechanics’
16 compensation under the bona fide Section 7(i) pay plan.” ECF No. 157 at 11. To verify
17 its use of a one-year representative period, TBC submitted a declaration given by
18 Hoskins, whereby she attested to TBC’s use of a one-year representative period. ECF
19 No. 157-1 (“Hoskins first declaration”).

20 On February 28, 2020, plaintiffs responded to TBC’s motion for summary
21 judgment, ECF No. 156, to which TBC replied on March 6, 2020, ECF No. 159. In their
22 reply, TBC submitted a second declaration given by Hoskins, whereby Hoskins again
23 attested to TBC’s use of a one-year representative period. ECF No. 159-1 (together with

1 Hoskins first declaration, “Hoskins declarations”). On March 6, 2020, plaintiffs replied
2 to TBC’s response to their motion for summary judgment together with a motion to strike
3 the Hoskins declarations. ECF No. 160. On March 18, 2020, plaintiffs refiled their
4 motion to strike as a separate motion. ECF No. 161.¹ On March 20, 2020, TBC
5 responded to plaintiffs’ motion to strike, ECF No. 162. On April 1, 2019, the court held a
6 hearing on plaintiffs’ motion to strike. ECF No. 165. After the hearing, the court asked
7 the parties to submit supplemental briefing and documents regarding discovery requests
8 and questions asked in the Hoskins Depos. On April 2, 2020, both parties submitted the
9 requested documentation, ECF No. 166–67. On April 8, 2020, the court denied
10 plaintiffs’ motion to strike. ECF No. 168. These motions have been fully briefed and are
11 now ripe for the court’s review.

12 **II. STANDARD**

13 **A. Summary Judgment**

14 Summary judgment shall be granted “if the pleadings, the discovery and
15 disclosure materials on file, and any affidavits show that there is no genuine dispute as to
16 any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R.
17 Civ. P. 56(c). Rule 56(c) of the Federal Rules of Civil Procedure requires that the district
18 court enter judgment against a party who, ““after adequate time for discovery . . . fails to
19 make a showing sufficient to establish the existence of an element essential to that party’s
20 case, and on which that party will bear the burden of proof at trial.”” Stone v.
21 Liberty Mut. Ins. Co., 105 F.3d 188, 190 (4th Cir. 1997) (quoting Celotex Corp. v.
22 Catrett, 477 U.S. 317, 322 (1986)). “[T]his standard provides that the mere existence of

¹ ECF No. 160 and ECF No. 161 are the same document.

1 some alleged factual dispute between the parties will not defeat an otherwise properly
2 supported motion for summary judgment; the requirement is that there be no genuine
3 issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986).
4 “Only disputes over facts that might affect the outcome of the suit under the governing
5 law will properly preclude the entry of summary judgment.” Id. at 248. “[S]ummary
6 judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the
7 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
8 Id.

9 “[A]t the summary judgment stage the judge’s function is not himself to weigh
10 the evidence and determine the truth of the matter but to determine whether there is a
11 genuine issue for trial.” Id. at 249. When the party moving for summary judgment does
12 not bear the ultimate burden of persuasion at trial, it may discharge its burden by
13 demonstrating to the court that there is an absence of evidence to support the non-moving
14 party’s case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-movant must
15 then “make a showing sufficient to establish the existence of an element essential to that
16 party’s case, and on which that party will bear the burden of proof at trial.” Id. at 322.

17 Any reasonable inferences are to be drawn in favor of the nonmoving party.
18 Anderson, 477 U.S. at 255, Webster v. U.S. Dep’t of Agric., 685 F.3d 411, 421 (4th Cir.
19 2012). However, to defeat summary judgment, the nonmoving party must rely on more
20 than conclusory allegations, mere speculation, the building of one inference upon
21 another, or the mere existence of a scintilla of evidence. See Anderson, 477 U.S. at
22 252; Stone, 105 F.3d at 191. Rather, “a party opposing a properly supported motion
23 for summary judgment...must ‘set forth specific facts showing that there is a genuine

1 issue for trial.” Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 522
 2 (4th Cir. 2003) (quoting Fed. R. Civ. P. 56(e) (2002) (amended 2010)). If the adverse
 3 party fails to provide evidence establishing that the fact finder could reasonably decide in
 4 his favor, then summary judgment shall be entered “regardless of ‘[a]ny proof or
 5 evidentiary requirements imposed by the substantive law.” Id. (quoting Anderson, 477
 6 U.S. at 248).

7 **B. Decertification**

8 Under the FLSA, individual employees may institute a collective action against
 9 their employer on behalf of themselves and other similarly situated employees. Section
 10 216(b) of the FLSA states:

11 An action . . . may be maintained against any employer . . . in any Federal
 12 or State court of competent jurisdiction by any one or more employees for
 13 and on behalf of himself or themselves and other employees similarly
 14 situated. No employee shall be a party plaintiff to any such action unless
 15 he gives his consent in writing to become such a party and such consent is
 16 filed in the court in which such action is brought.

17
 18 29 U.S.C. § 216(b). The mechanism outlined in § 216(b) is designed to facilitate the
 19 efficient adjudication of similar claims by “similarly situated” employees by permitting
 20 the consolidation of individual claims and the pooling of resources in prosecuting such
 21 actions against their employers. Gordon v. TBC Retail Group, Inc., 134 F. Supp. 3d.
 22 1027, 1031 (D.S.C. 2015); see also Hoffmann–La Roche Inc. v. Sperling, 493 U.S. 165,
 23 170 (1989); LaFleur v. Dollar Tree Stores, Inc., 30 F. Supp. 3d 463, 467 (E.D. Va. 2014).
 24 In deciding whether the named plaintiffs in an FLSA action are “similarly situated” to
 25 other potential plaintiffs, courts generally employ a two-stage approach. Gordon, 134 F.
 26 Supp. 3d. at 1031; see also Pelczynski v. Orange Lake Country Club, Inc., 284 F.R.D.

1 364, 367 (D.S.C. 2012); Simons v. Pryor's, Inc., 2011 WL 6012484, at * 1 (D.S.C. Nov.
2 30, 2011).

3 The first step in this process is the “notice,” or “conditional certification,” stage.
4 Gordon, 134 F. Supp. 3d. at 1031 (quoting Purdham v. Fairfax County Pub. Sch., 629 F.
5 Supp. 2d 544, 547 (E.D. Va. 2009)). With regard to this conditional certification stage,
6 “[t]he Supreme Court has held that, in order to expedite the manner in which collective
7 actions under the FLSA are assembled, ‘district courts have discretion[,] in appropriate
8 cases[,] to implement ... § 216(b) ... by facilitating notice to potential plaintiffs.’”
9 Purdham, 629 F. Supp. 2d at 547 (quoting Hoffmann–La Roche, Inc., 493 U.S. at
10 169); see Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 74 (2013) (“‘[C]onditional
11 certification’ does not produce a class with an independent legal status, or join additional
12 parties to the action. The sole consequence of conditional certification is the sending of
13 court-approved written notice to employees, who in turn become parties to a collective
14 action only by filing written consent with the court.” (citing § 216(b))). At this stage, the
15 plaintiff must demonstrate that the proposed class members are “similarly situated” and
16 that notice is “appropriate.” Id. at 548. Ordinarily, the plaintiff’s burden at this initial
17 stage is fairly lenient, requiring only a modest factual showing that members of the
18 proposed class are “victims of a common policy or plan that violated the law.” Gordon,
19 134 F. Supp. 3d. at 1031–32; Regan v. City of Charleston, S.C., 2014 WL 3530135, at *2
20 (D.S.C. July 16, 2014); Long v. CPI Sec. Sys., Inc., 292 F.R.D. 296, 298–99 (W.D.N.C.
21 2013); Essame v. SSC Laurel Operating Co. LLC, 847 F. Supp. 2d 821, 824–25 (D. Md.
22 2012); Steinberg v. TQ Logistics, Inc., 2011 WL 1335191, at *1 (D.S.C. Apr. 7,
23 2011); Purdham, 629 F. Supp. 2d at 547–48.

“Second, after the court has conditionally certified the class, the potential class members have been identified and notified, and discovery has been completed, ‘a defendant may then move to decertify the collective action, pointing to a more developed record to support its contention that the plaintiffs are not similarly situated . . .’” Gordon, 134 F. Supp. 3d. at 1032; Regan, 2014 WL 3530135, at *3 (quoting Pelczynski, 284 F.R.D. at 368); Purdham, 629 F. Supp. 2d at 547. At this “decertification stage” the court applies a heightened, fact-specific standard to the “similarly situated” analysis, Regan, 2014 WL 3530135, at *3, and considers various additional factors, including: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendants that appear to be individual to each plaintiff; and (3) fairness and procedural considerations. Gordon, 134 F. Supp. 3d. at 1032. If the court determines that the plaintiffs are not, in fact, similarly situated, the court may decertify the class, dismiss without prejudice the opt-in plaintiffs’ claims, and permit the named plaintiffs to proceed on their individual claims. Holmes v. Charleston Retirement Investors, LLC, 115 F. Supp. 3d 653, 657 (D.S.C. 2014).

III. DISCUSSION

A. Summary Judgment

18 TBC argues the court should grant summary judgment in their favor because their
19 commission rate is “bona fide” in accordance with Section 7(i)’s overtime exemption
20 requirements. ECF No. 152-1 at 11–18. Plaintiffs contend that the court should grant
21 summary judgment in their favor because TBC’s commission rate is a “sham” and does
22 not meet the requirements to qualify for the Section 7(i) overtime exemption. ECF No.
23 153 at 14–20. TBC also argues that the court should grant summary judgment against all

1 plaintiffs who failed to file written consents within two-years because plaintiffs cannot
2 meet their burden of establishing a willful violation. ECF No. 152-1 at 18–20. Plaintiffs
3 contend that the totality of TBC’s conduct demonstrates “a clear pattern of reckless
4 disregard for the FLSA,” and as such, the court should find that a three-year statute of
5 limitations applies in this instance and deny TBC’s motion for summary judgment with
6 respect to plaintiffs who filed their written consents within such three-year period. ECF
7 No. 156 at 8–12. Finally, TBC argues that the court should grant summary judgment
8 during the weeks for which plaintiffs have stipulated that they can assert no claim for
9 overtime compensation under the FLSA. ECF No. 152-1 at 20–21; ECF No. 152-3; ECF
10 No. 152-4.

11 The court will begin its analysis by examining the plaintiffs’ stipulation of
12 circumstances where no claim for overtime can be made, then turn its attention to the
13 statute of limitation arguments, and finally examine if TBC’s compensation plan meets
14 the requirements under Section 7(i) to allow for exemption from overtime under the
15 FLSA.

16 **1. Stipulated Claims**

17 TBC argues that because plaintiffs stipulated that they can assert no claim for
18 overtime compensation under the FLSA for certain weeks, the court should grant
19 summary judgment for claims that arose during those weeks. ECF No. 152-1 at 20–21;
20 ECF No. 152-3; ECF No. 152-4. Plaintiffs do not contest this argument. Therefore, the
21 court grants summary judgment in favor of TBC for the weeks that plaintiffs stipulated
22 no claim for overtime compensation under the FLSA can be made.

23

2. Statute of Limitations

TBC argues that the court should grant summary judgment against all plaintiffs who failed to file written consents within two-years because plaintiffs cannot meet their burden of establishing a willful violation. ECF No. 152-1 at 18–20. Plaintiffs contend that the totality of TBC’s conduct demonstrates “a clear pattern of reckless disregard for the FLSA,” and as such, the court should find that a three-year statute of limitations applies in this instance and deny TBC’s motion for summary judgment for plaintiffs who filed their written consents within such three-year period. ECF No. 156 at 8–12.

“The FLSA provides two potential limitations periods. For non-willful FLSA violations, a two-year statute of limitations applies. When the violation is willful, a three-year statute of limitations applies.” Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351, 357 (4th Cir. 2011). “Only those employers who ‘either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]’ have willfully violated the statute.” Id. (quoting McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988)). “Reckless disregard of the requirements of the [FLSA] means failure to make adequate inquiry into whether conduct is in compliance with the [FLSA].” 5 C.F.R. § 551.104. Conduct that is merely unreasonable or negligent fails to satisfy the willfulness standard. McLaughlin, 486 U.S. at 133. “All of the facts and circumstances . . . are taken into account in determining whether a violation was willful.” Id. In sum, “if an employer acts unreasonably, but not recklessly, in determining its legal obligation,” it is not acting “willfully.” Id. at n. 13. In an alleged FLSA violation dispute, plaintiffs bear the burden of proof when alleging a violation is willful. Perez v. Mountaire Farms, Inc., 650 F.3d 350, 375 (4th Cir. 2011). “Although this is ultimately a

1 question of fact, a plaintiff must present sufficient evidence of willfulness to survive
2 summary judgment.” Randolph v. PowerComm Const., Inc., 309 F.R.D. 349, 364 (D.
3 Md. 2015) (quoting Hantz v. Prospect Mortg., LLC, 11 F. Supp. 3d 612, 617 (E.D. Va.
4 2014).

5 Plaintiffs concede that failure to consult with a lawyer cannot alone demonstrate a
6 willful violation. ECF No. 156 at 9. However, plaintiffs contend that TBC’s failure to
7 consult with an employment lawyer or with the Department of Labor (“DOL”) when they
8 implemented the compensation plan at issue combined with their other conduct, is
9 sufficient to establish a willful violation. Id. Plaintiffs rely on Sellers v. Keller
10 Unlimited LLC, to argue that the totality of TBC’s conduct demonstrates a reckless
11 disregard of the FLSA. 388 F. Supp. 3d 646, 652 (D.S.C. 2019). Other than failing to
12 consult a lawyer when implementing the plan initially, the facts in this instance are not
13 analogous to Sellers. In Sellers, the district court found the defendants conduct to be
14 reckless because the defendants continued to implement their compensation plan even
15 after being notified by the DOL that their plan violated the FLSA. 388 F. Supp. 3d at
16 651–52. Here, conversely, TBC’s corporate counsel worked with the DOL during an
17 investigation of their compensation plan, and an audit by the DOL revealed no violations
18 of the FLSA. ECF No. 99-1. Plaintiffs have provided no evidence that TBC was on
19 notice that their compensation plan was in violation of the FLSA.

20 The court determined it was not in a position to rule on this matter earlier in the
21 proceedings and left open the possibility that once discovery closed plaintiffs would
22 “provide evidence that TBC knew, or had reckless disregard for, whether its
23 compensation plan violated the FLSA.” ECF No. 118 at 39. However, discovery has

1 now closed and plaintiffs have failed to provide such evidence. Courts have found
2 employers willfully violated the FLSA when those companies ignored unequivocal
3 warnings that they were out of compliance with the FLSA, destroyed or withheld records
4 to block investigations into their employment practices, or split employees' hours
5 between two companies' books to conceal their overtime work. See Herman v. Palo
6 Group Foster Home, Inc., 183 F.3d 468, 474 (6th Cir. 1999); Martin v. Deiriggi, 985 F.2d
7 129, 136 (4th Cir. 1992); Randolph v. PowerComm Const., Inc., 309 F.R.D. 349, 364 (D.
8 Md. 2015); Hurd v. NDL, Inc., 2012 WL 642425, at *6 (D. Md. Feb. 27, 2012); Cubias v.
9 Casa Furniture and Bedding, LLC, 2007 WL 150973 *3 (E.D. Va. 2007). Plaintiff have
10 not shown any evidence that TBC engaged in any conduct of that nature. Instead,
11 plaintiffs contend that TBC's norm of a 50-hour work week, the guaranteed wage rate
12 being more than one and half times the minimum wage, and their alleged failure to
13 identify a representative period for their compensation plan are sufficient to show a
14 willful violation of the FLSA. ECF No. 156 at 10–11. Plaintiffs contention is misguided.
15 Having a norm of a 50-hour work week is not a mandatory violation of the FLSA
16 overtime requirements. Ensuring more than one and half times the minimum wage is a
17 requirement of Section 7(i), and complying with a provision of the FLSA is not evidence
18 of willful misconduct. Furthermore, contrary to plaintiffs' claim, ECF No. 156 at 10,
19 TBC did identify a representative period for their compensation plan, ECF No. 157-1;
20 ECF No. 159-1.

21 In short, plaintiffs have not provided sufficient evidence that TBC knowingly
22 violated or recklessly disregarded the FLSA. When viewing the facts in the light most
23 favorable to the non-moving party, the court finds that plaintiffs failed to meet their

1 burden that TBC willfully violated the FLSA, and therefore, the court grants TBC's
 2 motion for summary judgment for all plaintiffs who failed to file written consents within
 3 the two-year statute of limitation.²

4 **3. Bona Fide Commission Rate**

5 An employer can be exempt from the overtime requirements in § 207(a) if it
 6 meets the requirements set forth in Section 7(i). Section 7(i) states:

7 No employer shall be deemed to have violated subsection (a) by employing
 8 any employee of a retail or service establishment for a workweek in excess
 9 of the applicable workweek specified therein, if (1) the regular rate of pay
 10 of such employee is in excess of one and one-half times the minimum hourly
 11 rate applicable to him under section 206 of this title, and (2) more than half
 12 his compensation for a representative period (not less than one month)
 13 represents commissions on goods or services. In determining the proportion
 14 of compensation representing commissions, all earnings resulting from the
 15 application of a bona fide commission rate shall be deemed commissions
 16 on goods or services without regard to whether the computed commissions
 17 exceed the draw or guarantee.

18
 19 29 U.S.C. 207(i). “Whether an employee is exempt from the FLSA’s overtime
 20 requirements is a mixed question of law and fact.” Williams v. Genex Servs., LLC, 809
 21 F.3d 103, 109 (4th Cir. 2015). “The question of how the [employees] spent their working
 22 time . . . is a question of fact. The question whether their particular activities excluded
 23 them from the overtime benefits of the FLSA is a question of law.” Icicle Seafoods, Inc.
 24 v. Worthington, 475 U.S. 709, 714 (1986); see also Walton v. Greenbrier Ford, Inc., 370
 25 F.3d 446, 450 (4th Cir. 2004) (“The determination of whether an employee falls within
 26 the scope of a FLSA exemption is ultimately a legal question.”). The court is now
 27 required to apply a fair reading of the exemption, rather than the previously-accepted

² This finding includes plaintiffs identified as “3-Year SOL Opt-In Plaintiffs” in the document labeled “Chart of Remaining Plaintiffs.” ECF No. 152-13 at 3–5.

1 narrow reading. See Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1142 (2018)
2 (“Because the FLSA gives no ‘textual indication’ that its exemptions should be construed
3 narrowly, there is no reason to give [them] anything other than a fair (rather than a
4 ‘narrow’) interpretation”).

5 Plaintiffs concede that TBC is a retail establishment and that plaintiffs’ regular
6 rate of pay was in excess of one and one-half times the minimum hourly rate, therefore
7 initially satisfying the first two requirements of Section 7(i). ECF No. 153 at 13. Where
8 the contention arises is with TBC’s purported compliance with the third requirement of
9 Section 7(i) — that more than half the compensation for plaintiffs in the representative
10 period represents commissions on goods or services. Because all earnings resulting from
11 the application of a bona fide commission rate must be deemed commissions under
12 Section 7(i), the court will now examine if TBC’s compensation plan applies a “bona fide
13 commission rate” that would allow TBC to be exempt from the overtime requirements in
14 § 207(a).

15 When deciding questions of statutory interpretation, the court begins with the text
16 of the statute. Othi v. Holder, 734 F.3d 259, 265 (4th Cir. 2013). However, neither the
17 FLSA nor the DOL regulations provide a definition for the term “commission” as it is
18 used in the retail or service exemption. See Wilks v. Pep Boys, 278 F. App’x 488, 489
19 (6th Cir. 2008); Parker v. NutriSystem, Inc., 620 F.3d 274, 278 (3d Cir. 2010). “Indeed,
20 the meaning of ‘commission’ under the FLSA ‘is an issue that finds little illumination
21 from the sparse case law and the vague references in statutes and regulations.’”
22 McAninch v. Monro Muffler Brake Inc., 799 F. Supp. 2d 807, 813 (S.D. Ohio 2011)
23 (quoting Klinedinst v. Swift Investments, Inc., 260 F.3d 1251, 1254 (11th Cir. 2001)).

1 The lack of case law and ambiguity in the statutes and regulations have led other courts to
2 use a variety of methods when determining a bona fide commission rate.

3 Some courts have focused on the typical compensation methods for employees of
4 retail or service establishments under § 29 C.F.R. § 779.413(a). See Viciado v. New
5 Horizons Computer Learning Ctr. of Columbus, Ltd., 246 F. Supp. 2d 886, 890 (S.D.
6 Ohio 2003); Donovan v. Highway Oil, Inc., 1986 WL 11266, at *3 (D. Kan. July 18,
7 1986). Other courts have looked to the language in § 29 C.F.R. § 779.416(c) to see if the
8 employee “always or almost always earns the same fixed amount of compensation for
9 each workweek (as would be the case where the computed commissions seldom or never
10 equal or exceed the amount of the draw or guarantee)”. See McAninch, 799 F. Supp. 2d
11 at 813 (holding that an employee exceeding the guarantee 19% of the time “easily
12 constitute more than seldom.”); Herman v. Suwannee Swifty Stores, Inc., 19 F.Supp.2d
13 1365, 1371 (M.D.Ga.1998) (finding that never exceeding the guarantee or only exceeding
14 it once a year was “clearly not” a bona fide commission rate, but refusing to grant
15 employees summary judgment motion for employees who exceeded the guarantee only
16 two to four times a year).

17 Still, other courts have shifted away from the regulations when defining what
18 constitutes a bona fide commission rate. In Casanova v. Gold's Texas Holdings Grp.,
19 Inc., the district court extracted factors that the Third and Seventh Circuits have used to
20 make such a determination:

21 First, a bona fide commission is either a percentage or proportion of the
22 ultimate price passed on to the consumer. See Parker, 620 F.3d at 283; Yi
23 v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 508 (7th Cir. 2007). Second,
24 a bona fide commission is decoupled from actual time worked, so that there
25 is an incentive for the employee to work more efficiently and effectively.
26 See Parker, 620 F.3d at 284; Yi, 480 F.3d at 509; Charlot v. Ecolab, Inc.,

1 136 F. Supp. 3d 433, 451 (E.D.N.Y. 2015). Third, the type of work is such
2 that its “peculiar nature” does not lend itself to a standard eight-hour work
3 day. Alvarado v. Corp. Cleaning Servs., Inc., 782 F.3d 365, 368 (7th Cir.
4 2015). Fourth, the compensation system must not offend the purposes of
5 the FLSA. Id. No factor appears dispositive in the case law, but the first
6 two seem to carry the most weight.

7
8 2016 WL 1241548, at *8 (W.D. Tex. Mar. 23, 2016). Some courts have shifted away
9 from the regulations but embraced a less formulaic approach, applying “a smell test, one
10 that reaches beyond the formal structure of the commission rate and into its actual effects
11 and the purpose behind it.” Leal v. Magic Auto Touch Up, Inc., 2018 WL 297339, at *3
12 (N.D. Tex. Jan. 4, 2018) (internal quotation marks omitted) (quoting Erichs v. Venator
13 Grp., Inc., 128 F.Supp.2d 1255, 1260 (N.D. Cal. 2001)). In short, there is no one
14 established standard for evaluating what constitutes a bona fide commission rate under
15 the FLSA.

16 TBC argues its Turned Hours Pay compensation plan utilizes the industry-
17 accepted “flat rate” system which is recognized as a bona fide commission rate, and
18 therefore, the court should grant summary judgment in its favor that the compensation
19 plan utilizes a bona fide commission rate. ECF No. 152-1 at 14. TBC also argues that
20 because their employees pay fluctuated from week to week, its compensation plan
21 utilizes a bona fide commission rate under § 779.416(c). Id. at 15. Plaintiffs argue that
22 TBC’s compensation plan is not analogous to the typical “flat rate” system because of the
23 method of compensation TBC utilizes when the Turned Hours Pay is not greater than one
24 and half times the minimum wage, and therefore, the court should grant summary
25 judgment in its favor that the compensation plan does not utilize a bona fide commission
26 rate. ECF No. 153 at 19. Plaintiffs also contend that TBC’s commission rate is not bona
27 fide according to § 779.416(c) because the commission rate never affected the rate of pay

1 for its employees. Id. at 17. The court will first examine if TBC’s use of different
2 compensation methods in one plan constitutes a bona fide commission rate.

3 **a. Turned Hours Pay Hybrid Plan**

4 Several courts have held that the Turned Hours Pay compensation plan utilized by
5 TBC constitutes bona fide commission rate for purposes of Section 7(i). See, e.g.,
6 Parker, 620 F.3d at 283 (concluding that a meal plan provider that paid sales associates
7 on a commission basis when the associates received flat rates according to the sales they
8 made was a bona fide commission rate); Yi, 480 F.3d at 509-10 (holding Section 7(i)
9 exemption applies where compensation determined by multiplying the number of booked
10 hours for the job by the ratio of the team member’s actual hours worked to the total hours
11 worked by the team, and then by a wage per booked (not actually worked) hour, based on
12 the skill or quality of the individual team member); Klinedinst, 260 F.3d at 1256 (noting
13 that “[p]ayments of between \$12 and \$15 per flagged hour provide incentives for
14 employees to work efficiently and effectively to the benefit of the employer, who may
15 then take on more customers at a greater profit margin, and the employee, who reaps the
16 benefits of increased flag hours regardless of the actual amount of hours worked,” and
17 holding that plaintiff’s flat rate wages constitute a “commission”); Pittman v. McClain’s
18 R.V., Inc., 2013 WL 12139092, at *11 (E.D. Tex. June 12, 2013) (holding that flag rate
19 system for service technician constituted “bona fide commission rate” where “[a]ll flat-
20 time employees’ compensation would . . . be tied to customer demand, the plan would
21 provide performance-based incentives for the employee to increase his or her income,

1 and there would be proportionality between the value of the goods or services sold and
2 the rate paid to the employee.”).

3 TBC contends that its compensation plan is analogous to these plans. ECF No.
4 152 at 14. However, none of those cases involved a compensation scheme like TBC’s
5 plan, under which the employee’s compensation is based on either the industry-accepted
6 Turned Hours Pay or a flat hourly rate multiplied by the number of hours the employee
7 actually worked. Because TBC’s compensation plan involves a scenario where the
8 Turned Hours Pay is not the only compensation method utilized, the court finds that
9 TBC’s compensation plan is distinguishable from the plans in Parker, Yi, Klinedinst, and
10 Pittman.

11 Plaintiffs argue that because TBC’s compensation plan utilized an hourly rate
12 floor when it didn’t utilize the Turned Hours Pay, the plan is comparable to the
13 commission rate utilized by the employers in Herman v. Suwannee Swifty Stores, Inc.,
14 19 F. Supp. 2d 1365 (M.D. Ga. 1998). The court is not persuaded. In Herman, the DOL
15 had investigated the plan at issue and found that it was in violation of the FLSA. Id. at
16 1368. Here, the DOL previously investigated this plan and found that it did not violate
17 the FLSA. ECF No. 99-1. In Herman, nearly 70% of all employees under the
18 compensation scheme never received more than the guaranteed rate for all hours worked
19 during the entire period in question. 19 F. Supp. 2d at 1371. Here, only three of
20 plaintiffs remaining, or less than 10%, never received more than the guaranteed rate for
21 all hours worked.³ ECF No. 152-13; ECF No. 153-13. Finally, there is no evidence that

³ Of the plaintiffs who opted-in within the two-year statute of limitations, only Andrew Gordon, Dawn Dewey, and Bryan Dawson, Jr. never received more than the guaranteed rate for all hours worked. ECF No. 152-13; ECF No. 153-13.

1 the employer in Herman utilized a method like the Turned Hours Pay when it did not
2 implement compensation on a fixed hourly rate basis. This clearly distinguishes the TBC
3 compensation plan from the plan examined in Herman.

4 At times, TBC utilizes a “straight commission without advances” compensation
5 method that is a bona fide commission rate. § 29 C.F.R. § 779.413(a)(4); Viciedo, 246 F.
6 Supp. 2d at 896. At other times, TBC utilizes a “straight hourly rate” compensation
7 method which is not a bona fide commission rate. § 29 C.F.R. § 779.413(a)(1); Viciedo,
8 246 F. Supp. 2d at 896. Thus, TBC utilizes a hybrid plan. Although a compensation
9 scheme that combines features of a salary plan under § 779.413(a)(1) with the
10 components of a commission plan under § 779.413(a)(4) may not be a bona fide
11 commission plan, there is no per se rule that such a combination makes a commission
12 plan not bona fide. Crawford v. Saks & Co., 2016 WL 3090781, at *7 (S.D. Tex. June 2,
13 2016). Because TBC’s compensation plan utilizes a hybrid method for commission rates,
14 the court finds that it needs to look beyond § 29 C.F.R. § 779.413(a) to determine if TBC
15 utilizes a bona fide commission rate.

16 **b. Casanova Test**

17 The aggregated factor test established in Casanova does not lead to a clear
18 determination of whether or not TBC’s commission rate is bona fide. The first two
19 factors of the Casanova test, while not dispositive, are given the most weight in
20 determining if a commission rate is bona fide. 2016 WL 1241548, at *8. However, the
21 outcome of the analysis changes depending on which component of TBC’s hybrid
22 compensation plan is being utilized. When compensation is calculated based on the
23 Turned Hours Pay, both the “proportionality” factor and “decoupled from actual work

1 time” factor weigh in TBC’s favor. However, both of those factors weigh in plaintiffs’
2 favor when compensation is calculated based on the fixed hourly rate multiplied by the
3 number of hours worked. Although the third and fourth factors, whether the work is of a
4 “peculiar nature” and if the plan “offends the purposes of the FLSA”, respectively, weigh
5 slightly in favor of TBC, neither factor is so substantially in TBC’s favor as to be
6 determinative for the outcome of the court’s analysis. Therefore, the court finds that it
7 cannot rely solely on the Casanova test to makes its determination of whether TBC
8 utilizes a bona fide commission rate. The court now turns its attention to § 779.416(c)
9 and the “smell test” to determine if TBC utilizes a bona fide commission rate.

10 **c. § 779.416(c) and the “Smell Test”**

11 Having found other methods for determining a bona fide commission rate
12 inconclusive, the court turns its attention to § 779.416(c) and the “smell test”. Plaintiffs
13 argue that the court should find TBC’s commission rate does not comply with
14 § 779.416(c) because its employees’ rate of pay does not change as a result of the
15 commission rate. ECF No. 153 at 17. Plaintiffs also contend that TBC did not set their
16 commission rate in “good faith” and that as a result, the commission rate does not pass
17 the “smell test” of a bona fide commission rate. Id. at 16, 19. TBC maintains that the
18 correct interpretation of § 779.416(c) focus not on the rate of pay but on the fact that
19 plaintiffs’ weekly pay fluctuated and was not fixed as a result of the commission rate.
20 ECF No. 152-1 at 15. TBC argues that because plaintiffs weekly pay fluctuates, their
21 commission rate is bona fide.

22 A commission rate is not bona fide if the formula for computing the
23 commissions is such that the employee, in fact, always or almost always
24 earns the same fixed amount of compensation for each workweek (as would

1 be the case where the computed commissions seldom or never equal or
2 exceed the amount of the draw or guarantee).
3
4 29 C.F.R. § 779.416(c). The “smell test” requires the court to “reach[] beyond the formal
5 structure of the commission rate and into its actual effects and the purpose behind it.”
6 Erichs, 128 F. Supp. 2d at 1260. To accurately assess these facts under the “smell test,”
7 the court cannot divorce the “fluctuating weekly payment” argument from the “seldom or
8 never exceed the guarantee amount” argument. To do so would not allow the court to
9 reach beyond the formal structure of TBC’s commission rate.

10 Looking at TBC’s commission rate as whole, it passes the “smell test.” Plaintiffs
11 rely on Erichs to argue that TBC did not set its commission rate in good faith. ECF No.
12 153 at 19. In Erichs, the employer originally had a salary-plus-commission plan that
13 capped a store manager’s salary at a particular amount, and when that plan’s legality was
14 challenged under state law, the employer changed its plan to a new structure that was
15 effectively the same as the original plan. 128 F. Supp. 2d at 1257–58. The court in
16 Erichs held the evidence that the new plan replicated the original, illegal plan, offered a
17 factual dispute material to deciding whether the second plan was made in good faith. Id.
18 at 1260–61. Unlike Erichs, there is no evidence in the present record that TBC’s plan
19 was designed to replicate a previous illegal plan or that TBC otherwise acted in bad faith.
20 As stated previously, TBC’s corporate counsel worked with the DOL during an
21 investigation of their compensation plan and an audit revealed no violations of the FLSA.
22 ECF No. 99-1. Furthermore, only four of the remaining plaintiffs never exceeded the
23 guarantee or only exceeded the guarantee one time, and each of the plaintiffs had a non-
24 fixed amount of pay for each work week. TBC’s most efficient mechanics over the last
25 five years earned between \$118,000 and \$286,000 per year under the pay plan, with

1 mechanics across the plan averaging an hourly rate of \$17.26. ECF No. 159-1 at 1. This
2 demonstrates that the plan is aligned with the purposes of the FLSA. See 29 U.S.C.
3 § 202(a). Even counsel for plaintiffs concedes that “the sky is the limit” regarding
4 compensation for TBC employees under the compensation plan. ECF No. 152-10 at 52.
5 This is sufficient for the court to find that TBC set its commission rate in good faith.
6 However, that does not mean that TBC’s commission rate was always bona fide.

7 Courts performing their analysis under the prior narrow reading standard in place
8 before Encino Motorcars, LLC, set a range of percentages that constitute “seldom” when
9 determining whether a compensation plan utilizes a bona fide commissions rate. In
10 Herman, never exceeding the guarantee or only exceeding it once a year was “clearly
11 not” a bona fide commission rate. 19 F.Supp.2d 1365 at 1371. However, the Herman
12 court rejected a holding that exceeding the guarantee 10% of the time or less constituted
13 “seldom” as a matter of law in spite of the DOL arguing the court should grant summary
14 judgment in favor of the employees when the commission rate only exceeded the
15 guarantee 10% of the time or less. Id. In McAninch, the court found that where an
16 employee’s compensation only exceeded the guarantee 19% of the time such a
17 commission rate “easily constitute more than seldom” and was therefore, bona fide. 799
18 F. Supp. 2d at 813. In Lee v. Ethan Allen Retail, Inc., although the employee only
19 exceeded the draw 28% of the time and the employee’s pay never increased even when it
20 exceeded the draw, the court found the commission rate the employer utilized to be a
21 bona fide commission rate in part because the employee did not always or almost always
22 earn the same fixed amount each week and the plan provided the employee the

1 opportunity to work more in order to earn more. 651 F.Supp.2d 1361, 1364, 1367 (N.D.
2 Ga. 2009).

3 In short, even under a narrow reading of what constitutes “seldom,” courts have
4 found that exceeding the guarantee in wages only 19% of the time “easily constitutes
5 more than seldom” and rejected a holding that exceeding the guarantee in wages only
6 10% of the time was per se “seldom”. Under the now required fair reading standard
7 established in Encino Motorcars, LLC, the court interprets these holdings to stand for the
8 proposition that if an employee exceeds the guarantee in wages more than 10% of time,
9 that employee has a wage that exceeds the amount of the draw or guarantee more often
10 than seldom. Twenty-two of the remaining plaintiffs exceeded the guarantee more than
11 10% of the time, had a non-fixed amount of pay for each week, and had been paid under
12 a compensation plan that would increase their pay if jobs were completed more
13 efficiency. Under the now-required fair reading standard established in Encino
14 Motorcars, LLC, the court finds that TBC utilized a bona fide commission rate for these
15 employees as a matter of law. As a result, these twenty-two plaintiffs had commissions
16 representing more than 50% of their wages.

17 Four of the remaining plaintiffs never exceeded the guarantee or only exceeded
18 the guarantee one time. The court finds that for these employees, the TBC compensation
19 plan did not utilize a bona fide commission rate as a matter of law. There are five
20 remaining plaintiffs that only exceeded the guarantee between 6%-10% of the time.
21 Plaintiffs contend that the limitations on exceeding the guarantee were based on these
22 plaintiffs’ inability to select which jobs they would work on and the locations where they
23 each worked not having enough customers to allow them to shift to the Turned Hour Pay

1 compensation system. ECF No. 153 at 20. TBC argues that the limitations on exceeding
2 the guarantee is because those individual employees did not work efficiently. ECF No.
3 152-1 at 10, 27; ECF No. 159 at 2. Because the question of how employees spend their
4 working time is a question of fact, Icicle Seafoods, Inc., 475 U.S. at 714, and there is a
5 genuine dispute over these facts, summary judgment for these plaintiffs is inappropriate.

6 Therefore, the court grants in part and denies in part TBC's motion for summary
7 judgment, and the court grants in part and denies in part plaintiffs' motion for summary
8 judgment. The court grants summary judgment in favor of TBC for plaintiffs Faton
9 Bajrami, Lanny Bauyan, Jack Clark, Scott Flamholtz, Juan Lopez, Raymond Mackinlay,
10 Alex Officer, Matthew Perez, Leonard Purvee, Taylor Hooks, Adam Claypool,
11 Francinildo Silva, David Leininger, Peter Gilzene, Jeffrey Walker, Carlos Guzman, Cole,
12 Fernando Rivera, Christopher Mitchum, Robert Withrow, Jonathon Jimenez, and Duston
13 Everett. The court grants summary judgment in favor plaintiffs for Perry Shockley,
14 Bryan Dawson, Jr., Dawn Dewey, and Andrew Gordon. The court denies summary
15 judgment for both TBC and plaintiffs for Thomas Clark, James Hardenbrook, Rashaad
16 Collins, Frederick Schultz, and Kenny Schultz.

17 **B. Decertification**

18 At this "decertification stage" the court applies a heightened, fact-specific
19 standard to the "similarly situated" analysis, Regan, 2014 WL 3530135, at *3, and
20 considers various additional factors, including: (1) the disparate factual and employment
21 settings of the individual plaintiffs; (2) the various defenses available to defendants that
22 appear to be individual to each plaintiff; and (3) fairness and procedural considerations.
23 Gordon, 134 F. Supp. 3d. at 1032. If the court determines that the plaintiffs are not, in

1 fact, similarly situated, the court may decertify the class, dismiss without prejudice the
2 opt-in plaintiffs' claims, and permit the named plaintiffs to proceed on their individual
3 claims. Holmes v. Charleston Retirement Investors, LLC, 115 F. Supp. 3d 653, 657
4 (D.S.C. 2014). The complaint identifies three different locations where the named
5 plaintiffs worked. ECF No. 1. All three factors for decertification are dependent on
6 whether the remaining plaintiffs all worked at the same locations and/or if the policy for
7 assigning work was the same for all locations. At this time, the court does not know
8 whether the five remaining plaintiffs all worked at the same locations or if the policy for
9 assigning work was the same for all locations. The court takes under advisement the
10 motion for decertification and asks both parties to submit additionally briefs in detailing
11 the factual and employment setting of the individual plaintiffs including detailing the
12 process for how work is assigned. Briefs shall be filed no later than 14 days from the
13 filing of this order.

14

1 **IV. CONCLUSION**

2 For the reasons set forth above, the court grants in part and denies in part TBC's
3 motion for summary judgment, and the court grants in part and denies in part plaintiffs'
4 motion for summary judgment, and takes under advisement on TBC's motion for
5 decertification until additional briefs are filed.

6 **AND IT IS SO ORDERED.**
7
8

A handwritten signature in black ink, appearing to read 'D. Norton', is written over a horizontal line.

9
10 **DAVID C. NORTON**
11 **UNITED STATES DISTRICT JUDGE**
12

13
14 **June 16, 2020**
15 **Charleston, South Carolina**